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No. 328

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IN THE

Supreme Court of the United States

October Term, 1967

LESTER C. NEWTON TRUCKING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

October Term, 1967

No. ———

LESTER C. NEWTON TRUCKING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the District of Delaware, entered March 29, 1967, dismissing a Complaint seeking to set aside orders of the Interstate Commerce Commission. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The Opinion of the District Court for the District of Delaware is reported in 264 F. Supp. 969. The Opinions of the Interstate Commerce Commission are recorded in 84 M.C.C. 759, 89 M.C.C. 269 and 96 M.C.C. 702. Copies of the Opinion of the Court below, as well as the Exam-

iner's Report and all Commission decisions, are reproduced in a separate Appendix accompanying this Jurisdictional Statement.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336, to set aside orders of the Interstate Commerce Commission (hereinafter "the I.C.C." or "the Commission"). The judgment of the District Court was entered on March 20, 1967, and notice of appeal was filed in that Court on May 4, 1967. The jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States, et al* v. *Carolina Freight Carriers Corporation*, 315 U.S. 475; *Willis Shaw Frozen Express, Inc.* v. *United States et al.*, 377 U.S. 159.

QUESTIONS PRESENTED

1. Did Section 7(b) of the Transportation Act of 1958 confirm the right of motor carriers holding certificates authorizing the transportation of property made subject to regulation by Section 7(a) of the 1958 Act to continue to transport such property?

2. If so, can a carrier holding certificates authorizing the transportation of all exempt property prior to the 1958 Act properly be found thereafter not to hold certificates embracing frozen fruits, frozen vegetables and frozen berries made subject to regulation by Section 7(a) of the 1958 Act?

3. May the Commission validly determine a carrier's "grandfather" application under Section 7(c) of the 1958 Act and a contemporaneous application under Section

207 of the Interstate Commerce Act covering the transportation of frozen fruits, frozen vegetables and frozen berries, based upon:

a) Misinterpretation of the carrier's existing certificates as not embracing the commodities involved;

b) Limitation of consideration of the territorial nature and characteristics of the transportation service involved to a small portion of the actual territory involved;

c) A finding that the services of other existing carriers are not inadequate to meet the needs of the involved shippers and receivers?

STATUTES INVOLVED

Sections 203(b)(6) and 207(a) of the Interstate Commerce Act, 49 U.S.C., §§ 303(b)(6), 307(a); and Section 7 of the Transportation Act of 1958 (72 Stat. 573), are set forth in Appendix A hereto.

STATEMENT

Appellant, plaintiff below, is a common carrier of freight by motor vehicle operating in interstate commerce. This action was brought in the Court below to suspend, set aside and permanently enjoin orders of the Commission, dated April 28, 1961, May 10, 1962, and May 19, 1965, insofar as those orders implement restrictive interpretation of Appellant's existing certificates and deny operating authority sought by Appellant under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573) and Section 207(a) of the Interstate Commerce Act (49 U.S.C. § 307(a)).

(1) Statutory Background

Prior to the Transportation Act of 1958, Section 203(b)(6) of the Interstate Commerce Act, as amended,

49 U.S.C. § 303(b)(6), exempted from the Commission's economic regulation:

> [M]otor vehicles used in carrying property consisting of . . . agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation;[1]

Because of the provisional character of this so-called "agricultural exemption", the Commission in circumstances deemed appropriate issued certificates and permits authorizing the transportation of unmanufactured agricultural commodities.[2]

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[1] The language of the quoted portion of the statute was amended only twice after initial adoption of the Motor Carrier Act, 1935. Public Law No. 255, 74th Cong., August 9, 1935, Ch. 498, 49 Stat. 543. An amendment in 1938 added the clauses "property consisting of" and "if such motor vehicles are not used in carrying any other property, or passengers, for compensation" and deleted the word "exclusively" which had previously appeared immediately following "motor vehicles used". Public Law No. 777, 75th Cong., 3d Sess., June 29, 1938, Ch. 811, §§ 2, 3, 52 Stat. 1237. In 1952 the words "including horticultural" were added. Public Law No. 472, 82nd Cong., 2d Sess., July 29, 1952, Ch. 599, 66 Stat. 479. For an exhaustive discussion of the legislative history see Judge Graven's opinion in *Interstate Commerce Commission* v. *Allen E. Kroblin*, 113 F. Supp. 599 (N.D. Iowa, 1953), aff'd 212 F. 2d 555 (C.A. 8, 1954), *cert. den.* 348 U.S. 896 (1954).

[2] The Commission originally construed the agricultural exemption as inapplicable to a motor vehicle which *at any time* handled nonexempt commodities and issued operating authorities in accordance with that construction. *E. g., Deer Contract Carrier Application*, 43 M.C.C. 437 (1944). However, the Commission's interpretation was rejected in two court cases, the courts concluding that the statute exempted unmanufactured agricultural commodities unless they move *in the same vehicle* with nonexempt commodities. *Interstate Commerce Commission* v. *Dunn*, 166 F. 2d 116 (C.A. 5, 1948); *Interstate Commerce Commission* v. *Service Trucking Co.*, 91 F. Supp. 533 (E.D. Pa., 1950), aff'd 186 F. 2d 400 (C.A. 3, 1951). Thereafter, the Commission acquiesced in the courts' interpretations. *The Transport Corporation Extension—Maryland Counties*, 53 M.C.C. 75 (1951).

The 1958 Act was enacted in an atmosphere of uncertainty and continuing dispute concerning the status of innumerable commodities and was designed both to eliminate uncertainty and to bring under complete economic regulation some items, including frozen fruits, frozen berries and frozen vegetables, which had been found to be exempt unmanufactured agricultural commodities.[1] Section 7(a) added two provisos to the agricultural exemption, the first adopting the commodity status classification in a Commission ruling (Administrative Ruling Number 107), the second, notwithstanding the first, specifically declaring certain property, including frozen fruits, frozen berries and frozen vegetables, not to be unmanufactured agricultural commodities. Sections 7(b) and 7(c) of the 1958 Act provided continuing rights to transport property made subject to regulation by Section 7(a) for those then holding operating authority (or prosecuting an application therefor) covering such property or who, on May 1, 1958, were in bona fide operation in the transportation of such property for compensation and filed an application for appropriate ("grandfather") authority.

(2) History Of These Proceedings

Appellant has specialized in the transportation of foodstuffs since 1932, operating since The Motor Carrier Act, 1935 both under certificates issued by the Commission and under the agricultural exemption. By 1958 the transportation of foodstuffs requiring refrigeration in transit, including frozen fruits, frozen berries and frozen vegetables, accounted for about 45% of its entire revenues. Operating from its headquarters at Bridgeville, Delaware (on the Del-Mar-Va Peninsula) Appellant of-

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[1] *E. g., East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49 (1956); *Home Transfer & Storage Company* v. *United States*, 141 F. Supp. 599 (W. D. Wash., 1956), aff'd *per curiam*, 352 U.S. 884 (1956).

fered service to and from points in the eastern United States, extending from Maine to Florida.

Since the 1958 Act made all transportation of frozen fruits, frozen vegetables, and frozen berries subject to regulation, Appellant filed a timely application under Section 7(c) of the 1958 Act (the *Grandfather Case*)[4] and an identical application under Section 207(a) of the Interstate Commerce Act, (the *Extension Case*),[5] seeking authority to transport these three commodities:

(1) Between all points in New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia and the District of Columbia;

(2) Between the points described in (1) above, on the one hand, and, on the other, all points in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, North Carolina, South Carolina, Georgia and Florida; and

(3) Between all points in Maine, Massachusetts, and Connecticut, on the one hand, and, on the other, all points in North Carolina, South Carolina, Georgia and Florida.[6]

Appellant sought only one grant of authority permitting it to continue to render service long offered and performed without the directional limitations and circuitous service which would result from handling the three com-

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[4] Styled by the Commission as *Lester C. Newton Trucking Co., Common Carrier "Grandfather" Application*, No. MC-113388 (Sub-No. 26).

[5] Styled by the Commission as *Lester C. Newton Trucking Co., Extension—Frozen Fruits, Vegetables and Berries*, No. MC-113388 (Sub-No. 27).

[6] The applications also sought to handle rejected and damaged shipments and empty pallets and containers on return. However, the Commission otherwise held that no authority is required for such transportation and that portion of the applications need not be further considered.

modities under certificates already held by Appellant when the 1958 Act was enacted. Appellant's pertinent pre-existing certificates authorize service to, from or between points in all 16 States and the District of Columbia covered by Appellant's applications, but in some areas the service authorized is in one direction (*e.g.*, to points in the New England States) and between some points authorized service could only be rendered via circuitous routes (*e.g.*, from Camden, New Jersey to New York City via Dover, Delaware).

At the consolidated hearing in 1961 on both applications Appellant offered evidence concerning the scope of its existing certificated authority, the area in which it offered and provided service, and the continued need for its service in the future. The applications were supported by two large processors of the commodities involved (John H. Dulany and Son, Inc. and Libby, McNeill & Libby), whose witnesses attested to Appellant's past holding out and service throughout the territory involved, responsive to the shifting origins and destinations, the future continuing and expanding need for service, and the adequacy of existing service only if Appellant's service was included. Opposing evidence was submitted in behalf of three rail carriers and eight motor common carriers.

Following the hearings there were four written Reports, the first by the Hearing Examiner and three by the Commission, two by its Division 1 (composed of three Commissioners) prior to the institution of this action in the lower Court (on October 12, 1962), one thereafter by the Entire Commission on reconsideration.* All of

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* Following this Court's decision in *Wells Cargo Freight Express, Inc. v. United States*, *supra*, the Commission vacated all prior orders and reopened both proceedings for reconsideration, the lower Court's action being stayed pending such reconsideration. The Entire Commission Report on Reconsideration followed, dated May 27, 1965.

these Reports are included in the separate Appendix accompanying this Jurisdictional Statement.

The Scope of the authority granted in each of these four Reports is summarized in chart form in Appendix B attached hereto and as shown therein varied widely. Fundamental to the impact of the proceedings upon Appellant, the Commission found that Appellant may now handle frozen fruits, frozen vegetables and frozen berries only under its pre-existing certificates reading *"General commodities"* or *"Frozen Foods"* and that Appellant may not handle them under its *"Agricultural commodities"* certificates.* The Commission thereby reduced Appellant's future service almost entirely to one direction (*to* all points in all States extending from Maine to North Carolina), outbound only from a few points in Delaware, Virginia and New York, and via circuitous routes from points in New Jersey and a few points in Maryland. Ultimately denying the *Extension Case* in its entirety, the Commission granted authority in the *Grandfather Case* only (a) between points in a base area consisting of the District of Columbia, Delaware, Maryland and points in Virginia on the Del-Mar-Va Peninsula; (b) from points in New York to points in the base area; (c) from points in the base area to points in New York and Pennsylvania, and two Connecticut, one Maine, and two New Jersey points; (d) from points in Pennsylvania to Exmore Va.; and (e) from Caribou, Maine to New York City, and Carnegie, Pa. Thus, except within the limited base area granted, the Commission's action would leave Appellant with atomized authority, almost entirely one-way, without substantial parity between Appellant's past and future operations, lacking requisite

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* Appellant has other certificated authority reading "Farm products, except citrus fruits", which was equated by the Commission with and deemed the same as the "Agricultural commodities" certificates and both are similarly comprehended herein under all discussions of the latter terminology.

flexibility to continue to meet the shifting requirements of its shippers within the entire area involved.

The lower Court recognized the central importance of interpretation of Appellant's pre-existing certificates to the validity of the Commission's ultimate action.[9] While refusing to accept the Commission's rationale that Appellant's pre-existing *Agricultural commodities* certificates did not cover frozen fruits, frozen vegetables and frozen berries prior to the 1958 Act, the District Court nonetheless concluded that Appellant's pre-existing certificates do not now cover such commodities. The District Court otherwise affirmed the Commission's actions in the *Grandfather* and *Extension Cases* based upon the restrictive interpretation.[10]

The Commission's Orders were restrained at all stages before the lower Court and, by Order of the lower Court, entered March 20, 1967, on stipulation of the parties, the Commission's Orders have been stayed pending disposition of this Appeal.

(3) The Commission And The Lower Court Have Narrowed Appellant's Pre-existing Certificates

Under Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. § 303(b)(6), the exempt status of a commodity depends upon the commodities otherwise handled

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[9] The Court stated, 264 F. Supp. 869, at 873-74:

"If we accepted this first argument that Newton's present certificates already authorize the desired full scope of transportation, it would of course become unnecessary to proceed further to Newton's second and third arguments under the 'grandfather' and extension provisions, respectively."

[10] The importance of the interpretation in the assessment by the District Court of the *Grandfather Case* is shown by its detailed comparison of the pre-existing authority of Appellant as restrictively construed to the scope of the authority granted by the Commission.

in the vehicle involved." The Commission, the lower Court, and Appellant all agree that Appellant's *Agricultural commodities* certificates were issued to permit the transportation of unmanufactured agricultural commodities as defined in Section 203(b)(6) "in those instances wherein transportation was not actually 'exempt' from economic regulation."[13] Thus, commodities included in Applicant's *Agricultural commodities* certificates are the same as those included within the agricultural exemption of Section 203(b)(6). Since Appellant's certificates were all issued long before the 1958 Act, it logically follows that Appellant's certificates included frozen fruits, frozen vegetables, and frozen berries prior to the 1958 Act.[14] Moreover, since Section 7(b) of the 1958 Act specifically saved the rights of holders of appropriate pre-existing certificates to continue to transport property made subject to regulation by Section 7(a), Appellant's pre-existing rights are confirmed by the 1958 Act itself.[15]

Despite the apparent simple logic involved, both the Commission and the lower Court reached the opposite result by entirely different routes. The Commission based its conclusion that Appellant's pre-existing *Agricultural commodities* certificates do not cover the commodities involved on the grounds that: (a) the Commission allegedly did not intend to include such frozen articles when it initially issued the authority; and (b) the 1958 Act, by making these frozen items subject to regulation

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[13] Decision, note 2, *supra*.

[14] First Commission Report, 54 M.C.C. 759, at 767. Compare, [illegible] F. Supp. 868, at 876; *Penn-Dixie Lines, Inc., Extension-Philadelphia*, 79 M.C.C. 188 (1958).

[15] [illegible] note 3 *supra*.

[illegible] 7(b) the narrowing of pre-existing [illegible] is in conflict with Section 212(a) of the [illegible] Act, 49 U.S.C. § 312(a). *Andrus v. Motion, Inc. v. United States*, 355 U.S. 534, at 538 n. 4 (1958).

and providing "grandfather" rights, allegedly "effectively removed" any possibility that such certificates would be construed to include such frozen articles. The Commission's first ground assumes a specific intent which could not have existed at the time the certificates in question were initially issued;[14] the Commission's second ground ignores and contradicts Section 7(b) of the 1958 Act.

The lower Court did not accept either of the Commission's grounds for construing Appellant's pre-existing *Agricultural commodities* certificates. The majority of the lower Court agreed that it could reasonably be concluded that immediately before the 1958 Act Appellant's *Agricultural commodities* certificates corresponded in scope to the Section 203(b)(6) exemption and permitted the transportation of frozen fruits, berries, and vegetables in mixed loads with non-exempt products. Assuming such pre-1958 Act coverage *arguendo*, the lower Court concluded, by a process of reasoning *sua sponte* and altogether unclear to Appellant, that these certificates do not now cover such articles.[15] Thus, without ap-

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[14] The Commission observed in discussing Appellant's *General commodities* and *Frozen foods* certificates, First Commission Report, 84 M.C.C. 759, at 768:

> "Admittedly, a commodity description may be subsequently construed to include 'new' items not considered at the time such description is employed."

All of Appellant's pre-existing *Agricultural commodities* certificates were initially issued in the earliest days of motor carrier regulation, when the Commission viewed as "tainted" a vehicle which at any time carried a non-exempt commodity. (See note 2 *supra*) and long prior to the beginning of motor carrier transportation of any commodities requiring refrigeration, an industry in its infancy in 1944. *Newton Extension—Frozen Foods*, 42 M.C.C. 787 (1944).

[15] The lower Court found that Appellant's pre-existing *General commodities* and *Frozen foods* certificates now cover the transportation of frozen fruits, vegetables and berries. However, the basis for distinguishing the coverage of such certificates from Appellant's pre-existing *Agricultural commodities* certificates is unclear. Prior to the 1958 Act no certificate was required for handling frozen fruits, vegetables or berries except when these articles

parently recognizing the fact, the lower Court has found that Appellant's pre-existing certificates were narrowed by the 1958 Act.

(4) The Limited Authority Granted By The Commission Would Atomize Appellant's Future Service And Deprive The Public Of Needed Service

Had the Commission remedied its narrow interpretation of Appellant's pre-existing certificates by appropriate grant of new authority Appellant could hardly be heard to complain. However, the Commission denied the *Extension Case* and granted only limited authority in the *Grandfather Case* confined to a limited base area in Delaware, Maryland, the District of Columbia and points in Virginia on the Del-Mar-Va. Peninsula and between this base area and a limited number of points.

In considering the grant of the limited base area the Commission expressly considered Appellant's pattern of operations and the characteristics of its service for the supporting processors.[17] Except with respect to the base area granted, however, the Commission gave no apparent consideration to Appellant's overall operations or the characteristics of its service for the supporting shippers. Instead, the Commission limited itself in the *Grandfather Case* to determining authority upon the basis of a statistical analysis of past shipments actually handled and in the *Extension Case* to a denial because existing service was not shown to be inadequate.

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moved in vehicles with other "regulated" commodities. Thus, in the absence of mixture none of the Appellant's certificates were required no matter how phrased. In the event of mixture all of Appellant's certificates, whether reading *General commodities, Frozen foods,* or *Agricultural commodities,* covered the otherwise exempt commodities in such cases.

[17] The fact that the supporting processors are engaged in the production of all three of the involved commodities—frozen fruits, vegetables and berries—was also expressly considered by the Commission as support for treating the three as a single class.

The statutory criteria for a grant of authority differed in the two cases, the *Grandfather Case* involving an application under Section 7(c) of the 1958 Act, the *Extension Case* involving an application under Section 207(a) of the Interstate Commerce Act. Appellant was less concerned with differing statutory criteria than with its ability to continue to render service within its area of service responsive to the shifting transportation requirements of the segment of the shipping public served by it.

The cumulative effect of the Commission's restrictive interpretation and restricted grant of authority would be an atomized, one-way, service ill-suited to meet the needs of the shipping public served by Appellant. The supporting processors have three Delaware (Bridgeville, Houston and Dover) and one Virginia (Exmore) processing points and Appellant has long served these locations inbound and outbound, handling traffic in both directions to and from points in all States extending from Maine to Florida as the vagaries of the shippers' traffic patterns dictated. Appellant may continue to serve these Delaware and Virginia points outbound under *Frozen food* certificates to all points in all States extending from Maine to North Carolina. However, by combining all pre-existing *General commodities* and *Frozen food* certificates with the authority granted by the Commission Appellant may not continue to serve any of these Delaware and Virginia points inbound from any point in New England or any point in North Carolina or Virginia (except on the Del-Mar-Va. Peninsula).[18]

The significance for the supporting processors of each

[18] The Hearing Examiner recommended a grant in the *Extension Case* inbound to the two major processing centers to the extent of Appellant's outbound *Frozen foods* authority as "[a] practical solution. . . ." The First Division Report likewise granted authority in the *Extension Case* from all points in all States (except New Hampshire, Vermont, Delaware and Virginia) extending from Maine to North Carolina to all points in Virginia, Delaware and Maryland.

type of shipment handled by Appellant was detailed in the record, reflecting Appellant's holding out and service commensurate with its limited size and the changing requirements of the processors throughout the area covered by the application, between processing centers and customers, warehouses, and co-packers, and between warehouses located throughout the area and customers and co-packers. Moreover, the supporting witnesses testified that existing service was adequate to meet their needs only if Appellant's service was included.[19] Nonetheless, the Commission ultimately denied the *Extension Case* on the ground that the evidence did not show that "the service afforded by existing service is inadequate."[20]

The lower Court recognized that the Commission's interpretation of Appellant's pre-existing certificates was fundamental to all of the Commission's actions in the *Grandfather* and *Extension Cases*.[21] Having found the Commission's interpretation warranted, the lower Court considered in detail the Commission's action in the *Grandfather Case*, comparing the authority sought and

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[19] The following pertinent colloquy occurred at the hearing during one processor's cross-examination (R. 148):

"Q. And presently the motor carriers that you have available into Houston, Delaware, and into the States previously mentioned would be adequate for the needs that you have now?

A. Yes.

Exam. Driscoll: Well, this is not understood. Does that include this applicant or not?

The Witness: Pardon?

Exam. Driscoll: Does this include this applicant or not?

The Witness: It does."

[20] Respecting part (8) of the applications (between points in Maine, Massachusetts and Connecticut, on the one hand, and on the other, points in North Carolina, South Carolina, Georgia and Florida) the supporting evidence showed a service needed which had not previously been available from anyone. The Hearing Examiner recommended a grant in the *Extension Case* excepting Florida.

[21] See note 8, supra.

granted, the authority held by Appellant under *General commodities* and *Frozen foods* certificates, and the actual shipments handled by Appellant. The lower Court evidenced no concern for the ultimate impact of the restricted grant upon Appellant's future ability to provide service in both directions throughout the areas encompassed responsive to the changing requirements of the shippers involved. Separately considering the *Extension Case* the lower Court found support for the Commission's finding of adequate existing service, including joint line service, and found that the Commission was warranted in concluding that the actual points served by Appellant beyond those covered by the grant in the *Grandfather Case* did not justify any additional grant.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

1. This appeal raises fundamental questions whether the Interstate Commerce Commission may narrow the scope of a motor carrier's authority confirmed by statute, administratively restrict legislation plainly intended to preserve a carrier's existing business under regulation on a substantial parity with its prior scope, and refuse to grant additional authority to enable service commensurate with preregulation scope because other services have not been shown to be inadequate. Each of these questions merits plenary consideration by this Court.

A. When Congress brought frozen fruits, frozen vegetables and frozen berries, *inter alia*, under complete regulation by the Transportation Act of 1958 it expressly provided continuing transportation rights in Section 7(b) for those then holding certificates. Pre-existing certificates corresponding to and comprehending the scope of commodities within the agricultural exemption prior to the 1958 Act thus were confirmed by statute and no discretion was vested in the Interstate Commerce Commission thereafter to narrow such certificates by re-

strictive interpretation. Here, both the Commission and the lower Court found Appellant's pre-existing certificates to be narrower now than they were before the 1958 Act. The Commission ignored Section 7(b) and found the "grandfather" provisions of Section 7(c) of the 1958 Act as evidence of congressional intent that pre-existing certificates not be broadly construed. The lower Court found Appellant's pre-existing certificates not to cover the involved commodities even if such coverage existed prior to the 1958 Act. The present scope of certificates antedating the 1958 Act is a matter of great importance to all motor carriers holding authority issued by the Commission prior to the 1958 Act. The plain meaning of Section 7(b) of the 1958 Act precludes narrowing the scope of such pre-existing authority and unless this Court reverses the findings below Appellant and all other motor carriers holding such authority will lose valuable transportation rights. This Court has not previously been afforded an opportunity to consider this issue.

B. It may not now be doubted that the proper criteria for determining the scope of "grandfather" rights under Section 7(c) of the Transportation Act of 1958 are the same as those under the Motor Carrier Act, 1935. *Willis Shaw Frozen Express, Inc.* v. *United States, supra.* The purpose of the "grandfather" clause was to assure "substantial parity between future operations and prior bona fide operations." *United States* v. *Carolina Freight Carriers Corp., supra,* 315 U.S. 475, at 481. In determining "grandfather" rights respecting the 1958 Act the Commission must consider the applicant's "status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of [the applicant] to perform the services." *Willis Shaw Frozen Express, Inc.* v. *United States, supra,* 377 U.S. 159, 160.

Except respecting the base area ultimately granted and otherwise in treating the three commodities as a single class, the Commission and the lower Court ignored all evidence except that of actual past points served in violation of the principles expressed in the *Carolina* and *Willis Shaw* cases.

C. The lower Court failed to judge the Commission's denial of all authority under Section 207(a) of the Interstate Commerce Act on the basis on which the Commission predicated such denial—the lack of showing of inadequacy of existing service. Compare, *Securities & Exchange Commission* v. *Chenery*, 318 U.S. 80 (1943). Thereby, the lower Court avoided considering how the Commission, in determining this issue, could reconcile this finding with the evidence showing that existing service was adequate only if Appellant's existing service was included. The lower Court's treatment of this issue is in conflict with the opinion of the three-judge District Court for New Hampshire in *Nashua Motor Express, Inc.* v. *United States*, 230 F. Supp. 646 (1964), which set aside a Commission denial under comparable circumstances, stating in part (at 653):

> By what hypothetical process of subtraction has Division 1 reached its conclusion that protestants' services *would* be adequate in the absence of those disputed services presently performed by the plaintiff applicant?

The lower court's consideration of the adequacy issue is also in conflict with the opinions of other three-judge District Courts. *Bowman Transportation, Inc.* v. *United States*, 211 F. Supp. 354 (N.D. Ala., 1962); *Dixie Ohio Express, Inc.* v. *United States*, 263 F. Supp. 993 (N.D. Ohio, 1966). The issue of adequacy of existing service when an applicant is already a competitor in the traffic involved is a matter of great importance to the proper

administration of motor carrier regulation and should be definitively determined by this Court.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Motor Carrier Act

Section 203 (b) (6), 49 U.S.C., § 303 (b) (6)*

(b) Nothing in this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (6) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof), if such motor vehicles are not used in carrying any other property, or passengers, for compensation: *Provided, That the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": Provided further, however, That notwithstanding the proceeding proviso the words "property consisting of ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)" shall not be deemed to include frozen fruits, frozen berries, frozen vegetables, cocoa beans, coffee beans, tea, bananas, or hemp, and wool imported from any foreign country, wool tops and noils, or wool waste (carded, spun, woven, or knitted), and shall be deemed to include cooked or uncooked (including breaded) fish or shell fish when frozen or fresh (but not including fish and shell fish which have*

* Emphasized portions are the amendments to this section effected by Section 7(a) of the Transportation Act of 1958, 72 Stat. 573.

been treated for preserving, such as canned, smoked, pickled, spiced, corned or kippered products)' . . .

Section 207(a), 49 U.S.C. § 307(a)

Subject to section 310 of this title, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: Provided, however, That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

Transportation Act of 1958

Section 7(a), 72 Stat. 573—[See Section 203(b)(6) of the Motor Carrier Act, *supra*]

(b) Unless otherwise specifically indicated therein, the holder of any certificate or permit heretofore issued by the Interstate Commerce Commission, or hereafter so issued pursuant to an application filed on or before the date on which this section takes effect, authorizing the holder thereof to engage as a common or contract carrier by motor vehicle in the transportation in interstate or foreign commerce of property made subject to the provisions of part II of the Interstate Commerce Act by paragraph (a) of this section, over any route or routes or within any territory, may without making application under that Act engage, to the same extent and subject to the same terms, conditions and limitations, as a common

or contract carrier by motor vehicle, as the case may be, in the transportation of such property, over such route or routes or within such territory, in interstate or foreign commerce.

(c) Subject to the provisions of Section 210 of the Interstate Commerce Act, if any person (or its predecessor in interest) was in bona fide operation on May 1, 1958, over any route or routes or within any territory, in the transportation of property for compensation by motor vehicle made subject to the provisions of part II of that Act by paragraph (a) of this section, in interstate or foreign commerce, and has so operated since that time (or if engaged in furnishing seasonal service only, was in bona fide operation on May 1, 1958, during the season ordinarily covered by its operations and has so operated since that time), except in either instance as to interruptions of service over which such applicant or its predecessor in interest had no control, the Interstate Commerce Commission shall without further proceedings issue a certificate or permit, as the type of operation may warrant, authorizing such operations as a common or contract carrier by motor vehicle if application is made to the said Commission as provided in Part II of the Interstate Commerce Act and within one hundred and twenty days after the date on which this section takes effect. Pending the determination of any such application, the continuance of such operation without a certificate or permit shall be lawful. Any carrier which on the date this section takes effect is engaged in an operation of the character specified in the foregoing provisions of this paragraph, but was not engaged in such operation on May 1, 1958, may under such regulations as the Interstate Commerce Commission shall prescribe, if application for a certificate or permit is made to the said Commission within one hundred and twenty days after the date on which this section takes effect, continue such operation without a certificate or permit pending the determination of such application in accordance with the provisions of part II of the Interstate Commerce Act.

APPENDIX B

COMBINED RIGHTS GRANTED IN *GRANDFATHER* AND *EXTENSION* CASES

EXAMINER'S REPORT

	From	*To*
1.	Boston and Cambridge, Mass., and all points in D.C., Conn., N.Y., N.J., Pa., Del., Md., Va., and N.C.	Exmore, Va., and Bridgeville, Del.
2.	Caribou, Me.	New York, N.Y.
3.	Watertown, Mass.	Philadelphia, Pa.

Between

All points in N.C., S.C., and Ga. on the one hand, and, on the other, all points in Me., Mass., and Connecticut.

DIVISION I

(FIRST AND SECOND COMMISSION REPORTS)[1]

	From	*To*
1.	Exmore, Va.	Sunbury, Carnegie, York and Williamsport, Pa., Landover and Hagerstown, Md., Wallingford, Conn., Lewistown, Me., and Binghamton, Newburg and New York, N.Y.
2.	Bridgeville, Del.	Exmore, Va.
3.	Exmore, Va.	Exeter, Pa.[2]

[illegible] Points listed in the First Commission Report [illegible] and more thereafter denied in the Second Commission Report [illegible] to it [illegible] in connecting [illegible] Virginia and Boston only:

COMBINED RIGHTS GRANTED IN *GRANDFATHER* AND *EXTENSION* CASES—Continued

From	*To*
4. Houston, Del.	New York, N.Y. and Hartford, Conn.[3]
5. Clayton, Del.	Exmore, Va.[4]
6. Points in Maine, Mass., R.I., Conn., N.Y., N.J. Pa., Md., N.C., and D.C.	Points in Va., Del., and Md.
7. Points in Maine, Mass. and Conn.	Points in Pa.
8. Points in Maine	Points in N.Y.

THIRD COMMISSION REPORT

From	*To*
1. Caribou, Me.	New York, N.Y. and Carnegie, Pa.
2. Points in N.Y.	D.C., and points in Md., Del., and Va. on the Delmarva Peninsula
3. Points in Pa.	Exmore, Va.
4. D.C., and points in Md., Del., and Va. on the Delmarva Peninsula	Hartford and Wallingford, Conn., Lewiston, Me., Kearney and Jersey City, N.J. and points in N.Y., and Pa.

Between

Points in Md., Del., and Va. on the Delmarva Peninsula, and the District of Columbia.

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[3] Frozen Vegetables only.

[4] Frozen Vegetables only.